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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARVIN BRODIE, M.D., et al.,

Petitioners,

v.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as a matter of law, the existence of a hypothetical connection between a state administrative regulation and a legitimate state interest creates an irrebuttable presumption sufficient to dismiss a due process challenge to the regulation when the challenging party has offered to prove the invalidity of the hypothetical connection.

2. Whether, as a matter of law, under the First Amendment, a state may restrict expressive conduct on the sole basis that alternative means of communication exist.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A. Appellants:

1. Marvin Brodie, M.D.

2. Yu-Shang Chang, M.D.

3. E. Arthur Kratzman, M.D.

B. Appellees: Board of Medical Examiners for the State of New Jersey

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BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 14, 1983.

OPINIONS BELOW

The unreported opinion and order of the Court of Appeals for the Third Circuit are set forth in Appendix A attached hereto. The unreported transcript of the oral opinion of the District Court granting respondent's motion for summary judgment is set forth in Appendix B attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered January 14, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are Amendment I and Amendment XIV to the Constitution of the United States.

The statutory provisions involved are New Jersey Stat. Anno. 45:9-2; and Rule 13:35-6.18, N.J.A.C.

These provisions are set forth in Appendix C attached hereto.

STATEMENT OF THE CASE

Plaintiffs are three licensed medical physicians who specialize in the practice of radiology in New Jersey. They have brought this case as a class action in behalf of all licensed radiologists in New Jersey against the Board of Medical Examiners of New Jersey ("Board") pursuant to 42 U.S.C. § 1983 seeking declaratory and other relief in connection with the promulgation by the Board of a regulation, N.J.A.C. 13:35-6.18 (hereinafter "regulation"), requiring all radiologists in New Jersey to provide radiological consultations to chiropractors upon demand.

Plaintiffs contend that the regulation is invalid in that (1) it requires radiologists to practice in a substandard manner that is likely to be hazardous to patients, without any compensating public benefit or rational relationship to a legitimite state interest and (2) it unnecessarily infringes upon plaintiffs' free speech rights under the First Amendment to the United States Constitution.

The Board proposed the regulation on June 5, 1980, four years after the Board had determined and publicized that it lacked authority to promulgate a rule interfering with the "principle relating to free choice of physicians by patient and the free choice of patient by physician." The Board received negative comments on the proposed regulation from a number of groups having both an interest and expertise in the subject matter of the regulation. These groups objected vigorously to the proposed regulation on numerous grounds and argued that it would interfere with sound medical practice and violate fundamental rights of radiologists. They unsuccessfully urged the Board to hold hearings on the proposed regulation. Without benefit of any hearing and without issuing any findings, explanation or reasoning, the Board adopted the regulation on August 5, 1980.

On September 19, 1980, Dr. Marvin Brodie filed the complaint herein and sought a preliminary injunction on the grounds that the regulation violates the First Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution.[1] Following a stay of the litigation pending disposition of related state law claims before the New Jersey courts, the Board moved for summary judgment, arguing that a rational relationship necessarily existed between the regulation and the state goal of promoting the public health and welfare. The plaintiffs were denied repeated requests to take any discovery, even after filing a Rule 56(f) affidavit explaining the need for discovery. Following oral argument, the district court granted judgment for the Board based upon the court's assumption that the plaintiffs would be unable to demonstrate the absence of a rational basis for the regula-

[1] Subsequently, the two additional plaintiffs were added in an Amended Complaint.

tion.[2] Plaintiffs' motion for reconsideration of the district court's ruling was supported by two affidavits from licensed New Jersey radiologists, demonstrating the irrationality of the regulation. These affidavits, in addition to the Rule 56(f) affidavit, remained the only record in the trial court. The district court nonetheless reaffirmed its prior judgment following another oral argument. App., at B-1.

The district court found the regulation valid notwithstanding the absence of any evidence, rulemaking history, or statement of purpose to support its decision concerning the rationality of the regulation. Indeed, repeatedly in the course of oral argument, the district court noted that "[o]f course [the regulation] is irrational." The court upheld the regulation solely on the basis of its own hypothesis, wholly unsupported by the record before it, that the health care of chiropractic patients would be furthered by providing needed medical radiologic services through the intermediary of a chiropractor. Moreover, in the face of unrebutted affidavit evidence to the contrary and without permitting discovery, the district court concluded that the regulation does not require radiologists to depart from standard radiologic practice or to provide substandard radiologic care. App., at B-4. The district court further ruled that no First Amendment rights had been implicated. App., at B-6.

Even though expressly recognizing that the regulation may require plaintiffs to practice below accepted radiologic standards, the Court of Appeals for the Third Circuit nonetheless affirmed. App., at A-10. The court of appeals relied upon the same unsupported hypothesis as the district court and rejected plaintiffs' offer to prove the invalidity of the hypothesis upon which the regulation was upheld. App., at

[2] Although the district court's ruling was denominated a summary judgment, the decision should be treated as a dismissal because there had been no discovery and no evidentiary record in the case.

A-5. The court further ruled that the regulation does not impermissibly restrict expressive conduct because alternative means of communication exist.[3] App., at A-9.

The full history of this regulation, from initial promulgation through supposed judicial review, represents a complete denial of any opportunity to examine or evaluate its rationality. The Board promulgated the regulation without holding public hearings. The regulation has no rulemaking history or statement of purpose. The plaintiffs have had no discovery and have been afforded no opportunity to demonstrate its invalidity. Rather, it has been validated by false hypotheses, unsupported in the record or in reason.

Given the opportunity, plaintiffs can prove the following at trial:

> (1) The phrase "diagnostic radiological procedures" refers to a wide range of a radiologist's diagnostic work, including prescription of radiologic procedures, invasive procedures,[4] and medical analysis and diag-

[3] The Court of Appeals noted that conduct must be understood as speech to be protected and suggested that plaintiffs had failed to create an issue of fact with respect to that requirement. App., at A-8. However, the only evidence of record indicates that the doctors are taking symbolic action and believe that their communication is so understood by a substantial portion of the medical community, chiropractors, patients, the general public, and public authorities. This evidence precludes a finding that the audience would not understand the conduct as speech. *See Spence* v. *Washington*, 418 U.S. 405, 408-11 (1974) (per curiam). Thus, the court's actual basis for rejecting the speech claim was its conclusion that plaintiffs have alternative means to express their views. App., at A-9; *infra*, at 16.

[4] Invasive procedures are those that require insertion into the body of some instrument, radiopaque fluid, or other foreign substance for diagnostic purposes. Several invasive procedures, the most common of which is the myelogram, pertain to skeletal areas of the body and would apparently be encompassed by the regulation.

nosis. The regulation compels radiologists to practice below the minimum professional standards of safe radiologic practice, because radiology is a specialty that requires assistance, judgment, and information from a primary medical doctor. There is no rational reason to require this substandard practice, as all patients including chiropractic patients, can obtain needed medical radiologic services in accordance with standard radiologic practice. *Even if* there were some category of patients who had lacked medical radiologic services, it is irrational to require radiologists to provide those services in a manner that is below minimum standards of practice, a requirement that can only pose hazards to those patients.

(2) A principal purpose of plaintiffs in refusing to accept referrals from chiropractors is to communicate, by means of symbolic action and force of example, their beliefs that chiropractic is unsound and unsafe and should not be supported by the medical profession or the government and should not be patronized by patients requiring medical treatment.

REASONS FOR GRANTING THE WRIT

This case merits review because the decision of the court below raises fundamental constitutional issues involving judicial review of state administrative regulation. The court below has validated, without the benefit of discovery or hearing, a state administrative regulation which arbitrarily infringes on basic constitutional rights, even though plaintiffs are prepared to show that the regulation has no basis in reason and cannot further any legitimate state interest. The result of applying the erroneous standard of judicial review utilized by the lower court is that substantial interference with important constitutional rights can occur without receiving meaningful judicial review.

Furthermore, the lower court's decision has significantly undermined the constitutional protection of free expression. The decision allows infringement of expressive conduct if alternative means of expression exist. The decision disregards the constitutional requirement that the restriction on free expression be no greater than necessary to further the governmental interest. Therefore, this Court should provide review in order to resolve and clarify these important constitutional issues.

I. The Due Process Claim

A. The decision of the Third Circuit raises an important question of constitutional law that should be settled by this Court.

The appellate court's ruling raises three fundamental constitutional issues. First, by allowing the due process challenge to be resolved without affording plaintiffs any discovery or evidentiary hearing, the court denied plaintiffs any meaningful or intelligible review of the state regulation. Such an approach completely precludes any due process challenge because it permits validation of the regulation by means of an irrational hypothesis not founded in fact or reason. Second, the type of analysis utilized below allows the protections of the due process clause to become contingent upon anomolous and unpredictable factors depending upon the imagination of the trial judge. Third, the lower court has created substantial uncertainty because of its application of an equal protection standard to evaluate a due process challenge.

It is uncontested that plaintiffs possess a due process right to practice medicine free of restrictions which bear no rational relationship to a legitimate state interest. The Constitution protects the right of a member of a learned

profession, such a physician, to exercise his own professional judgment concerning the manner in which he practices. In *Doe* v. *Bolton*, 410 U.S. 179 (1973), for example, the Supreme Court held unconstitutional several provisions requiring a physician to seek outside consultation or otherwise subordinate his own judgment to that of another physician, in part because they "unduly infring[e] on the physician's right to practice." *Id.* at 199; *see id.* at 195-200.[5] The physician's right to practice medicine necessarily includes the right to practice at the highest standards of the profession. *Nyberg* v. *City of Virginia*, 495 F.2d 1342, 1349 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974). Thus, the due process clause protects a physician's right to practice medicine free from irrational state regulations.

This Court should review the decision below because it has so distorted this Court's suggested approach to due process claims that the plaintiffs have been denied any meaningful or intelligible review of a state regulation which arbitrarily infringes on their right to practice medicine. Starting with the assumption that the Board's end in promulgating the regulation was to improve the quality of care provided to patients of chiropractors, the lower court hypothesized that compelling radiologists to provide needed medical radiologic services through a chiropractic intermediary would further that goal.

The plaintiffs can show that while the regulation infringes on a right protected by the due process clause, it bears *no* relationship to the suggested state purpose. Plain-

[5] Although a major focus of *Doe* and similar cases is the coordinate privacy right of the patient, the doctor, too, retains a right of his own to make his own professional decisions, free from unreasonable state restriction. *E.g.*, *Roe* v. *Wade*, 410 U.S. 113, 165-66 (1973); *AMA* v. *Weinberger*, 522 F.2d 921, 925 n.7 (7th Cir. 1975).

tiffs can prove that the regulation adds *nothing* to the ability of chiropractors to assure the safety of their patients. Indeed, it will *detract* from the safety of chiropractic patients in some cases by misleading them into believing that they are receiving qualified *medical* care from their chiropractors. At the same time, the regulation requires radiologists to practice below the minimum standards of safe, scientific radiology.[6]

The court of appeals carried the admittedly liberal rationality standard to the point of validating, without discovery or hearing, a regulation which has no regulatory history, no statement of purpose, and no findings, even though the challenging party is prepared to show that the regulation has no basis in reason and cannot further any legitimate state interest. The danger of such extreme judicial restraint in applying the rational relationship test is aptly demonstrated in a case such as the present one. Here, both the district court and court of appeals adopted a superficial analysis to a complex question, which can only be properly analyzed with the assistance of an evidentiary record. Not only are the assumptions made in the analysis incorrect, but the standard of judicial review

[6] The regulation would require radiologists to rely significantly on chiropractors for medical information, assistance, and judgment that radiologists normally receive from primary medical doctors. Radiology is a consultative specialty that is heavily dependent on other branches of medical practice. Consequently, proper radiologic evaluation is impossible without considerable assistance from the referring physician. Moreover, the results of radiologic studies are often meaningless except in conjunction with other medical tests or data. Some radiologic procedures, especially invasive procedures, cannot safely be performed without a thorough medical examination to assure that the patient can physically withstand the rigors of the diagnostic procedure. In short, a radiologist simply *cannot practice* safely or effectively without considerable professional support from other primary medical doctors. App., at A-4.

rejected any opportunity for correction. If a due process claim can be dismissed in these circumstances, the due process clause becomes an empty statement.

Rather than applying the holdings of precedent from this Court, the court below misapplied broad dicta in *Minnesota* v. *Cloverleaf Creamery*, 449 U.S. 456 (1981), and *Vance* v. *Bradley*, 440 U.S. 93 (1979), in reaching its result. Starting with the premise that the regulation must be upheld if legislative facts supporting it could reasonably be conceived by the decisionmaker, the district court erroneously concluded that the case could be decided on the basis of the court's own speculative assumptions, even in the face of a challenge to the validity of those assumptions. This Court's precedent reveals, however, that the factual basis for a regulation is crucial to a determination of its rationality. Indeed, this Court repeatedly has evaluated the rational relationship between a regulation and state interests on the basis of a factual record. *See, e.g., Minnesota* v. *Cloverleaf Creamery*, 101 S.Ct. 715, 724 (1981) (district court conducted extensive evidentiary hearings) ("parties . . . may introduce evidence supporting their claim that [legislation] is irrational"); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 75-79 (1976); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153-54 (1938). This approach, unlike that of the lower court, is sensible: the issue of whether a situation may "reasonably be conceived" can be intelligently addressed only by an examination of whether the "conception" comports with reality.

The lower court's error is particularly egregious because this regulation is the product of state agency, rather than legislative action. Where a state administrative agency promulgates a regulation without holding hearings, issuing findings, or articulating a purpose, the judiciary should not give its decision the same weight accorded to a legislative

action. Summary disposition, which denies the plaintiffs any opportunity to present evidence of the irrationality of a regulation, is wholly inappropriate in such circumstances. The court below should have afforded plaintiffs a hearing and an opportunity to show the irrationality of the regulation. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114-16 (1976). Some weight should have been given to the history of the regulation. *See Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

The lower court's treatment of an administration regulation as equivalent to a legislative act reflects a failure to recognize the basis for the circumscribed judicial review contained in the rational relationship test. Absent from administrative decisionmaking is the safeguard of correction of unwise policy by the democratic process, the safeguard which underpins the rational relationship analysis. *See Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). Administrative agency actions should not enjoy the heavy presumption of validity that legislative action enjoys: administrative bodies lack direct political responsibility and have such limited functions that their decisions cannot be presumed to reflect broadly shared values. More careful judicial review—including an opportunity for discovery and a hearing—is necessary to ensure that an administrative regulation is rationally related to a legitimate state interest. *See, e.g.*, Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1187 (1977).

Second, this Court should review the lower court's ruling because, without further guidance, the protection afforded by the due process clause will depend on anomolous and unpredictable factors. If no factual proof is permitted, reasonable conceivability will vary with the imagination of judges and information from extra-record sources which shape their imaginations. While such information neces-

sarily affects judges' determinations of what is reasonably conceivable, facts of record should not be *excluded* in making those determinations. The lower court has reached the disquieting conclusion that, in deciding whether a regulation bears a rational relationship to a legitimate state interest, facts which delimit what is conceivable may not be considered. This Court should clarify the application of the rational relationship test in order to prevent important constitutional rights from becoming dependent upon irregular and indefinite protection.

Third, the lower court has created substantial uncertainty because of its confusion of the rational relationship standards for due process and equal protection challenges. In rejecting the plaintiffs' due process claim, the court below relied on cases concerning the equal protection clause and applied the rigid tier system appropriate for such cases.

However, the rationality tests for due process and equal protection claims are analytically distinct: a regulation survives an equal protection challenge if it meets the threshold requirement of a reasonably conceivable connection between means and ends; a regulation comports with due process if the fundamental state interest is more significant than the burden on the individual right. The lower court's confusion of due process and equal protection standards results in a lack of conceptual clarity and a failure to recognize that the protection of individual liberty may be more complicated than the protection of the general right not to be classified on the basis of certain characteristics. *See Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Developments in the Law*, 93 Harv. L. Rev. 1156, 1197 (1980); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981 (1979); Perry, *Modern Equal Protection*, 79 Colum. L. Rev. 1023, 1074-83 (1979). The lower court's rigid categorical approach failed to allow consideration of

the various pertinent factors and led the court to base its decision on a hypothetical connection between the regulation and a state interest, rather than a flexible balancing test.

The proper test for a due process claim requires a weighing of the state interest and the effect on the individual right. The court should balance the nature of the individual interest, the degree to which it is affected, the closeness of the connection between the regulation and its purpose, the existence of alternative means, and the court's confidence that the regulation reflects a legitimate purpose. *See Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (comparing the significance of the individual interest with the importance of the governmental interests); *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 498-501 (1977) (plurality opinion) (where government intrudes on choices concerning family living arrangements, the Court carefully examines governmental interest and extent to which the regulation furthers the interest); *Roe* v. *Wade*, 410 U.S. 113, 152-66 (1973); *Zablocki* v. *Redhail*, 434 U.S. 374, 396 (1978) (Stewart, J., concurring in judgment); *Williams* v. *Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring in result).

The decision of the court below to apply an equal protection standard to a due process challenge may have stemmed from some ambiguity in this Court's precedent. Cases which clearly address due process claims and apply a flexible due process analysis sometimes are given an equal protection label. *E.g.*, *H. L.* v. *Matheson*, 450 U.S. 398, 400 (1981); *Harris* v. *McRea*, 448 U.S. 297, 317 (1980); *Maher* v. *Roe*, 432 U.S. 464, 474 (1977); *Sosna* v. *Iowa*, 419 U.S. 393, 406-408 (1975).

The need for consistent guidance is clear. The court below has created serious constitutional problems by deciding rational relationship questions in a cursory fashion. This

Court has recently recognized that this issue is open: "We express no view whether the District Court could have dismissed this case on the pleadings or granted summary judgment for the State on the basis of the legislative history, without hearing respondent's evidence." *Minnesota* v. *Cloverleaf Creamery*, 449 U.S. 456, n.8 (1981). *See Solis* v. *Miller*, 524 F.Supp. 1069, 1072 n.2 (S.D. Tex. 1981) ("[t]he absence of legislative history or statement of purpose also necessitated this Court, out of perhaps an excess of caution, to conduct a full evidentiary hearing"). This case presents the problem in the extreme in that the regulation has no regulatory history, no statement of findings, and no statement of purpose; the lower court's decision is solely conjecture, with no basis in fact or reason.

B. The Third Circuit has created conflicts with other circuits on an important question of constitutional law.

The Third Circuit's opinion upholds the dismissal of plaintiffs' due process claim on the basis of an application of the rigid tier equal protection test. This approach significantly varies from the approach of other circuit courts, which evaluate due process claims on the basis of a case-by-case balancing of the nature of the individual interest, the importance of the state interest, the degree of infringement, and the existence of alternative means.

In *Beller* v. *Middendorf*, 632 F.2d 788, 807-12 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981), for example, the Ninth Circuit examined a due process challenge to Navy regulations providing for discharge of those who engage in homosexual activities under a rational relationship standard. The court balanced the individual and state interests, the degree of infringement, and the existence of alternative means. In *Nachman Corp.* v. *Pension Benefit Guaranty*

Corp., 592 F.2d 947, 960 (7th Cir. 1974), *aff'd*, 446 U.S. 359 (1980), the Seventh Circuit applied a similar flexible balancing approach in evaluating a due process challenge to retroactive legislation under the rational relationship test. Thus, the decision of the lower court to apply a rigid tier rational relationship analysis to a due process claim is in direct conflict with the flexible balancing approach used in other circuit courts. Left unresolved, the fundamental conflicts the Third Circuit has raised will generate doubt and confusion in an important area of constitutional law, where consistent and reliable judicial guidance is necessary.

II. The Free Speech Claim

A. The decision of the Third Circuit raises an important question of constitutional law that should be settled by this Court.

The court below affirmed the dismissal of plaintiffs' free speech claim on the ground that plaintiffs have alternative means of communicating their views. This approach eviscerates plaintiffs' constitutional right to free expression. The right of free expression is a cental and fundamental element of constitutional protection, which requires a vigilant safeguard. Indeed, freedom of thought and speech is "the indispensable condition of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 326-27 (1937). *See Whitney* v. *California*, 274 U.S. 357 (1927) (Brandeis, J., concurring). Because the court's ruling significantly distorts the scope of protection the First Amendment extends to communicative conduct and fails to adhere to established free speech principles, this Court should review that ruling.

Although the court below noted that conduct must be understood to be protected speech and suggested that the plaintiffs had failed to create an issue of fact with respect

to that requirement, the basis of the court's decision is clearly its belief that alternative means exist for the plaintiffs to express their views. The only evidence of record—submitted to the district court and quoted by the court of appeals, App., at A-7 n.10—was the affidavit of Dr. E. Arthur Kratzman: "I believe that my expression by symbolic action and example is appropriate and necessary in order to convey my beliefs . . . I believe that my symbolic action and example is understood by at least a substantial part of my audience as an expression of my beliefs." Thus, the court below could not have decided that no dispute exists as to whether the conduct is communicative. *See Spence* v. *Washington*, 418 U.S. 405, 408-11 (1974) (per curiam); n.3, *supra*. The true ruling was that the conduct is not protected because the plaintiffs have alternative means to communicate their views. Indeed, the court below concluded:

> ". . . [A]lthough radiologists must perform diagnostic radiological services for patients referred by chiropractors, they remain free to recommend that these patients consult with what appellants term 'primary health care' physicians. In addition, they remain free to express their views, orally or in writing, about any alleged evils of chiropractic. They are also free to lobby the Board, the legislature, or the governor to try to change the regulation or to have it repealed. In short, there are several viable alternative channels for appellants to communicate their message. . . ."

App., at A-8-9.

Expressive conduct is clearly entitled to limited First Amendment protection. *E.g.*, *Spence* v. *Washington*, 418 U.S. 405 (1974); *Street* v. *New York*, 394 U.S. 576 (1969); *United States* v. *O'Brien*, 391 U.S. 367 (1968). The failure or refusal to act can be a silent, passive expression of opinion, entitled to constitutional protection. *Tinker* v.

Des Moines School District, 393 U.S. 503 (1969). Indeed, this Court has held that the conduct of a boycott is expressive conduct protected under the First Amendment. *NAACP* v. *Claiborne Hardware Co.*, 103 S.Ct. 3409, 3423 (1982).

The court of appeals committed a significant constitutional error in ruling that plaintiffs' expressive conduct is not protected under the First Amendment because "there are several viable alternative channels for appellants to communicate their message." App., at A-9. This standard turns the constitutional protection on its head. The proper test for expressive conduct is that the regulation should be upheld only if it is within the government's power, if it furthers an important government interest, if it is unrelated to the suppression of free expression, and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [governmental] interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). No such analysis was applied by either of the courts below.

Furthermore, this Court has emphasized that in the exercise of free speech through communicative conduct, the existence of alternative means of expression is irrelevant: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974), *quoting Schneider* v. *State*, 308 U.S. 147, 163 (1934). This Court has recently reaffirmed that the *O'Brien* test is appropriate in expressive conduct situations. *NAACP* v. *Claiborne Hardware Co.*, 103 S. Ct. 3409, 3425 (1982).

In evaluating the free speech claim, the court below should have determined whether less restrictive means

exist to further the governmental interest. For example, if the State desires to allow chiropractors to afford their patients a full medical analysis, a less restrictive method would be to require the chiropractor to refer the patient initially to a general medical practitioner or other primary care provider. If the State believes that chiropractors should have access to flatplate x-ray technology, then the obvious less restrictive method is to allow chiropractors to take their own x-rays, as presently authorized by the State, N. J. Stat. Ann. § 45:9-14.5, or require chiropractors who have x-ray machines to provide such services to fellow practitioners.

Under the erroneous analysis applied below, the plaintiffs lost the constitutional protection of their speech because the court could imagine alternative means of communication. The burden should have been reversed; the state must show that the restriction is no greater than is necessary to further the governmental interest. Without this protection, the First Amendment becomes an empty statement.

B. The Third Circuit has created conflicts with other circuits on an important question of constitutional law.

The Third Circuit's decision that the government restraint on plaintiffs' speech is permissible creates fundamental conflicts with the decisions of other United States Courts of Appeals and results in inconsistent protection of free expression. The court below upheld the dismissal of the plaintiffs' claim because effective alternative means of communication exist. The court essentially placed on the plaintiffs the burden of showing that their actions were the only channel available to express their views.

Other Courts of Appeals have rejected this narrow view of the protection of the First Amendment. In *Local 391* v. *City of Rocky Mount*, 672 F.2d 376, 380 (4th Cir. 1982), for example, the Fourth Circuit held that an ordinance prohibiting picketing without a city permit was an unconstitutional infringement on speech in the form of conduct because the restriction was more restrictive than necessary to secure the government's interests. *See also Hickory Fire Fighters Ass'n* v. *City of Hickory*, 656 F.2d 917, 923-24 (4th Cir. 1981). Other circuit courts have similarly required the state to tailor regulations which infringe on expressive conduct so that no less restrictive means are available to achieve its interests. *Chase* v. *Davelaar*, 645 F.2d 735, 739-40 (9th Cir. 1981) (nude dancing); *Henry* v. *First Nat'l Bank*, 595 F.2d 291, 302-04 (5th Cir. 1978), *cert. denied*, 444 U.S. 1074 (1980) (boycotts); *Home Box Office* v. *FCC*, 567 F.2d 9, 49-50 (D.C. Cir. 1977); *Davis* v. *Norman*, 555 F.2d 189 (8th Cir. 1977).

The need for guidance from this Court is clear. The Third Circuit's limited view of the protections of the First Amendment profoundly conflicts with the broader views of other circuit courts. The lower court's misplaced emphasis on the existence of alternative means of expression runs completely contrary to the requirement that the restriction on speech be no greater than is necessary to further the state's legitimate interest. The Court should review this case in order to clarify whether a state regulation may restrict expressive conduct merely because alternative means of communication are available and to provide the courts of appeals with a consistent standard by which to evaluate such regulations.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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April 13, 1983

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 82-5208

MARVIN BRODIE, M.D., et al.,

Appellants

v.

BOARD OF MEDICAL EXAMINERS
FOR THE STATE OF NEW JERSEY,

Appellee

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civ. No. 80-3066)

Argued October 21, 1982

Before: WEIS, and BECKER, *Circuit Judges*,
and CAHN, *District Judge**

(Filed January 14, 1983)

OPINION OF THE COURT

BECKER, *Circuit Judge.*

On July 9, 1980, the New Jersey State Board of Medical Examiners ("Board") promulgated a regulation that requires all radiologists in New Jersey to perform "diagnostic

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

radiological services" for patients who are referred by chiropractors. The principal question presented by this appeal is whether that regulation violates the due process clause of the fourteenth amendment by limiting the rights of radiologists to practice medicine as they see fit and to exercise their best professional judgment.[1]

The relevant part of the regulation reads as follows:

> (b) A physician possessing a plenary license to practice medicine and surgery who provides diagnostic radiological services for other physicians possessing a plenary license to practice medicine and surgery shall, upon the request of a chiropractic physician, provide diagnostic radiological services to such chiropractic physician without discrimination on the basis of classification of license, provided the diagnostic radiological services requested pertain to skeletal areas of a body.
>
> (c) Denial of professional diagnostic radiological services, as set forth herein, shall constitute purposeful and intentional discrimination and may subject the licensee to appropriate disciplinary action by the Board of Medical Examiners.

N.J. Admin. Code tit. 13, § 35-6.18 (1981). The "appropriate disciplinary action" to which subsection (c) refers may include suspension or revocation of a radiologist's license to practice medicine in the State of New Jersey.[2]

In September 1980, Dr. Marvin Brodie, a radiologist licensed to practice medicine in New Jersey, brought this action for preliminary injunctive relief and a declaratory

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[1] Jurisdiction is based on 28 U.S.C. § 1291 (1976).

[2] Among other duties, the Board grants licenses to qualified practitioners of medicine, surgery, and chiropractic within the State of New Jersey. The Board also possesses certain investigative, enforcement, and rule-making powers. *See generally* 45 N.J. Stat. Ann. at ch. 9 (West 1978 & Supp. 1982).

judgment that the regulation violates both the due process clause of the fourteenth amendment and the first amendment[3] Specifically, Brodie alleges that the Board lacked sufficient justification for its interference with the rights of radiologists to practice medicine and to exercise their best professional judgment—rights that Brodie contends are protected by the fourteenth amendment. Complaint at ¶¶ 17-20. In addition, Brodie alleges that the forced acceptance of referrals from chiropractors prevents radiologists from speaking symbolically by not accepting such referrals.

Following a stay of the litigation[4] pending disposition of state-law claims by the New Jersey courts,[5] the Board moved for summary judgment,[6] arguing that the regulation

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[3] Originally filed solely on behalf of Dr. Brodie, the complaint was subsequently amended to name as plaintiffs Marvin Brodie, Yu-Shang Chang, and E. Arthur Kratzman, "individually and on behalf of all other practicing radiologists similarly situated in the State of New Jersey."

[4] The district court actually abstained under Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), and thus retained jurisdiction.

[5] The Appellate Division of the New Jersey Superior Court unanimously upheld the challenged rule. Brodie v. New Jersey Board of Medical Examiners, 117 N.J. Super. 523 (App. Div. 1981), *cert. denied*, 87 N.J. 386 (1981).

[6] The district court had denied the Board's earlier motion for summary judgment. That motion, however, was based principally on the Board's contention that Brodie had presented his federal claims in state court fully and without reservation and that the state court's decision, *see supra* note 5, is res judicata as to those claims. The Board renews that argument here as an alternative ground for affirming the decision that is on appeal here.

Brodie, however, arguing that the district court's initial decision was correct, claims that any alleged presentation of federal claims in the state proceedings was purely for the information of that court and was accompanied by the express reservation required by

is a reasonable, and hence constitutionally permissible, means of promoting the public health and welfare. The district court, in granting the Board's motion for summary judgment, construed the regulation narrowly and stated that it merely requires radiologists to take flat-plate X-rays for chiropractors. The court held that the plaintiffs would not be able to demonstrate the absence of a rational basis for the regulation thus construed.

On appeal, plaintiffs take issue with the district court's construction of the regulation as well as the court's rational-basis holding. The plaintiffs argue that the regulation, properly construed, requires radiologists to perform the full panoply of radiological services for which they are trained, and to do so at the direction of, and in consultation with, chiropractors. They contend, however, that chiropractors are unqualified to play such a consultative role and that the state has no rational basis for imposing such an allegedly burdensome and potentially dangerous requirement.[7]

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

Our disposition of Brodie's substantive claims makes it unnecessary for us to decide this question.

[7] From appellants' perspective, the regulation is "irrational, futile, and dangerous" in two major respects. First, they assert that "chiropractors almost uniformly lack even a semblance of the medical training necessary to understand or act on medical diagnosis." Thus appellants contend that any radiological procedures they will provide pursuant to the regulation will be virtually worthless. More importantly, they contend that "the greatest evil of this regulation is that it requires radiologists to rely significantly on chiropractors for information, assistance, and judgment that radiologists ordinarily receive from other medical doctors." In particular, radiologists rely on other doctors, particularly the primary physician, to determine "what if any radiological procedures are safe, appropriate, or necessary." Appellants' Br. at 25-27.

Even assuming that appellants are correct that providing the "diagnostic radiological services" covered by the regulation will require radiologists to receive information from and consult with chiropractors, summary judgment was appropriate. It is well settled that social and economic regulation does not offend the due process clause if the regulation has a rational relationship to a legitimate state purpose. *See United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980). In challenging a regulation as violative of the due process clause, the burden is on the plaintiff to show the absence of such a rational relationship or such an illegitimate state purpose. *See Delaware River Basin Commission* v. *Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1092 (3d Cir. 1981).

In this case, there is no dispute that the New Jersey Board of Medical Examiners had a legitimate purpose for promulgating the regulation in question. The Board's intent was to insure that chiropractors have access to information indicating whether a patient's physical condition makes chiropractic treatment unwise or even dangerous. The district court offered as an example a chiropractor who does not have X-ray equipment[8] but "may need an X-ray picture to see whether a patient has a broken rib or a similar condition that would make spinal manipulation dangerous." Appellants' Br. at 24.

Indeed appellants do not contest the legitimacy of the State's purpose. Rather, they argue that the regulation is not rationally related to accomplishing its goal. To survive a motion for summary judgment, however, appellants must allege some set of facts which, taken as true, would suggest

[8] New Jersey law authorizes chiropractors to take X-rays. 45 N.J. Stat. Ann. § 9-14.5 (West 1978).

the absence of a rational basis.[9] Even construing the regulation as appellants suggest, however, we simply cannot find anything in the record that suggests that plaintiffs could carry their burden. Accepted as true (as they must be on a motion for summary judgment), their affidavits merely show that the regulation will impair the ability of radiologists to practice their profession at the standard or level that they would wish and to which they are accustomed. Nothing in those affidavits undercuts the presumption that the regulation will further the state's interest in providing better and safer medical care for the patients of chiropractors. *Cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("'[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' *Vance* v. *Bradley*, [440 U.S. 93, 111 (1979)].")

We also find that summary judgment was appropriate regarding the appellants' first amendment claims. As appellants correctly point out, the first amendment does protect expressive conduct, and the record in this case contains an affidavit stating that at least one radiologist intends, by

[9] Fed. R. Civ. P. 56(c) permits summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The burden of demonstrating the absence of all genuine issues of material fact rests on the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); all inferences from the evidence must be drawn in favor of the party opposing the motion, Small v. Seldows Stationery, 617 F.2d 992 (3d Cir. 1980); and summary judgment may not be granted if there is "the slightest doubt" about material facts, Tomalewski v. State Farm Life Insurance Co., 494 F.2d 882, 884 (3d Cir. 1974).

his refusal to accept referrals from chiropractors, to communicate his disapproval of that particular method of healing.[10]

We are not persuaded, however, that appellants' showing was sufficient to survive the Board's motion for summary judgment. The extent to which conduct is expressive turns not only on the communicative intent of the actor but also on the likelihood that his message will be understood:

> '[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.' But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

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[10] The affidavit of Dr. E. Arthur Kratzman states in part:

> A major purpose of my refusal to perform radiologic procedures on patients at the request of chiropractors is to communicate, by means of symbolic action and force of example, the above-stated beliefs [about chiropractic] to an appropriate audience, including patients, other radiologists, other medical doctors, chiropractors, public authorities, and the general public. . . . I believe that my expression by symbolic action and example is appropriate and necessary in order to convey my beliefs. I believe that if I were to provide radiologic services on patients at the request of chiropractors, my action would be taken by many patients, chiropractors, radiologists, other medical doctors, and others as an indication that I approve of chiropractors and chiropractic. I believe that my action will be so taken even though it is coerced by the state. I believe that my symbolic action and example is understood by at least a substantial part of my audience as an expression of my beliefs.

App. at 57-58.

Spence v. *Washington*, 418 U.S. 405, 409 (1974) (per curiam) (quoting *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968)). Although the affidavits submitted by the appellants certainly satisfy *Spence's* intent requirement, there is nothing in the record that suggests any likelihood that the actions of the radiologists would be understood to communicate the intended disapproval.

Moreover, even assuming that the radiologists' conduct is expressive, we do not believe that the regulation's requirements are so onerous or restrictive that they offend the first amendment.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. *O'Brien, supra*, 391 U.S. at 377. Applying this test to the case at bar, and mindful of the standards for summary judgment, we are convinced that appellants could advance no evidence sufficient to warrant the invalidation of the regulation. There is no question that the Board is empowered to promulgate the regulation and that the regulation furthers the important governmental interest in safe health care—an interest that is totally unrelated to the suppression of free expression. And, although we find it difficult to believe that this regulation will have any impact whatsoever on the right of radiologists to express their individual or collective opinion of chiropractic, any such impact will certainly be de minimis. Moreover, although radiologists must perform diagnostic radiological services for patients referred by chiropractors, they remain free

to recommend that these patients consult with what appellants term "primary health care" physicians. In addition, they remain free to express their views, orally or in writing, about any alleged evils of chiropractic. They are also free to lobby the Board, the legislature, or the governor to try to change the regulation or to have it repealed. In short, there are several viable alternative channels for appellants to communicate their message, and it would offend reason to hold that this regulation is prohibited by the first amendment.

The judgment of the district court will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

/s/ EDWARD R. BECKER
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-5208

BRODIE, M.D., Marvin, YU-SHANG CHANG, M.D., and E. ARTHUR KRATZMAN, M.C., individually and on behalf of all practicing radiologists similarly situated in the State of New Jersey

vs.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY

Marvin Brodie, M.D., Yu-Shang Chang, M.D., and Arthur Kratzman, Appellants

(D. C. Civil No. 80-03066)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ———— DISTRICT OF NEW JERSEY

Present: WEIS and BECKER, *Circuit Judges*,

CAHN*, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ———— District of New Jersey and was argued by counsel October 21, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 9, 1982 be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ SALLY MRVOS
Clerk

January 14, 1983

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 80-3066

MARVIN BRODIE, M.D., *Plaintiff*, vs. BOARD OF MEDICAL EXAMINERS, *Defendant*.	TRANSCRIPT OF PROCEEDINGS MOTION

Newark, New Jersey
February 22, 1982

* * * *

THE COURT: This case I think has reached its limit in this Court and I'm going to dispose of it today for once and for all, and I do not want to hear about it or to be associated with it again unless some higher authority tells me that I must.

My feelings about the impropriety of the regulation at issue are well set forth in the record. And I think it's an attempt to mix apples and oranges.

I think it has a great deal of deficiencies. As a legislator or member of the Medical Board I would have voted against its enactment, but it's here, my personal feelings cannot interfere with my obligations as a Judge.

This regulation in essence requires that radiologists, that is, specialists in x-ray diagnostic techniques, accept chiropractic referrals on a non-discriminatory basis and provide radiological diagnostic procedure to the referring chiropractor.

The regulation has been upheld by the New Jersey Superior Court Appellate Division in the case bearing the same title, *Brodie* vs. *New Jersey Board of Medical Examiners*, 177 N.J. Superior 523 Appellate Division 1981.

My understanding is, although I do not have the citation, the New Jersey Supreme Court has denied review.

The rationale of this regulation is set forth in a letter of Dr. Albano, President of the State Board of Medical Examiners, which is quoted in full in the Opinion of the Appellate Division.

I have on this Motion for Reconsideration received affidavits from E. Arthur Kratzman, M.D., a New Jersey radiologist, and from one Thomas F. Meaney, a radiologist in Ohio, a member of the American Board of Radiology and Chairman of the Division of Radiology at the Cleveland Clinic in Cleveland, Ohio.

Between these two affidavits a great many hobgoblins are raised. It is a utilization of a well-known technique with respect to legislation. One extends it to the absolute limit of its possible logic and then raises what I call in terrorem arguments of a regulation so extended.

One of the things that is mentioned in these affidavits is that, according to one far out construction of the affidavits, the chiropractors are going to be able to order such bodily invasive techniques as myelography, bone biopsy and angio or arteriograms. I don't think so. As a matter of fact, I'm confident that would not be so.

N.J.S.A. 45:9-14.5 defines the practice of chiropractic. And it states as follows: "The practice of chiropractic is defined as follows: A system of adjusting the articulations of the spinal column by manipulation thereof."

The statute goes on further to say, "A licensed chiropractor shall have the right in the examination of patients to use the neurocalorimeter, x-ray and other necessary instruments solely for the purpose of diagnosis or analysis. No licensed chiropractor shall use endoscopic or cutting instruments or prescribe, administer or dispense any drug or medicine for any purpose whatsoever, or perform any surgical operations except the adjustment of the articulations of the spinal column."

Now, I, for life of me, cannot understand how in the world of reason and sense and not nonsense, if a chiropractor is unable to perform and utilize in the practice of his "profession" bodily invasive techniques, he can order them. Just is not going to be possible in the real world.

A chiropractor cannot stick a hypodermic needle into a patient, he can't cut, and I don't think he can order it.

And if I'm wrong then there'll be another lawsuit on this regulation. But it is beyond my comprehension while reading the regulation, which could have been drawn more artfully, and the statute together, the regulation can expand the scope of the chiropractor's ambit of practice beyond the authorized statute itself. It just plain cannot be done.

And if a chiropractor cannot on his own use bodily invasive techniques, even minimal ones in the practice of his profession, it is clear to me he can't order them to be done by someone else. That should get rid of the in terrorem arguments submitted in this case.

It seems to me quite clear, although the Appellate Division didn't expressly say so, that this regulation is restricted to the use on chiropractic referrals by radiologists of flat plate AP lateral, et cetera, diagnostic x-rays. It does not have within its ambit the body invasive techniques that are used here to raise the in terrorem argument.

Another thing that has been raised by the affidavits that I have referred to, is the fact that radiologic procedures sometimes are preceded by medical consultation.

I know enough about medicine to know that in the normal course of events some of these sophisticated radiological diagnostic procedures—and I've mentioned them, most common of them are myelography, angiography, arteriography, bone biopsy—are done in hospitals and they are preceded by clearance of a medical doctor permitting the patient, or stating, rather, that the patient has a sufficient health status to undergo what I think we'll all agree is a pretty stressful and traumatic diagnostic experience.

I, for the life of me, cannot really understand how there are going to be many, if any, instances in the future where a radiologist would want within the ambit of his profession, and according to the standards of practice that guide him, a medical consultation before he puts a patient under the brief harmless process of having a flat plate made of the spine or the cervical area, or the foot, or whatever may have been ordered.

If, however, a radiologist believes that the standards of his profession require medical as distinguished from chiropractic clearance before one of these simple radiological diagnostic procedures are undertaken on the order of a chiropractor, as far as I can tell with this regulation, he is perfectly free to require it.

I think he's going to have to have a valid reason for it, I think such instances will be very, very few and far between on flat plate examinations, but I see nothing in the regulation that would in any way inhibit a doctor from requiring such consultation before undergoing that type of diagnostic procedure.

Now, in addition, as Mr. Goltz points out in his brief, if a radiologist has any questions about what the requirements of the regulation are, the Medical Board is there to answer his questions, and I understand there's a procedure whereby such a petition can be made to the Medical Board. am I correct?

• • • •

That's my understanding.

Let's go over this as thoroughly as I can.

There's an attack made on this regulation on First Amendment grounds. The cite to me is *Wooley* v. *Maynard*, 439 U.S. 705 1977.

It is claimed, as I understand it, that the regulation requiring acceptance of referrals as from chiropractors on a nondiscriminatory basis is in effect requiring speech, or forcing speech since requiring the acceptance of these referrals contradicts the doctor's belief and previously expressed, publicly expressed opinion that chiropractic has no value. And they claim they are forced into dealing with chiropractors, is forcing them to express a contrary opinion.

They claim in effect that this regulation forces radiologists to put their imprimatur approval on the practice of chiropractic.

I think that clearly is not so. The Wooley case I mentioned was one where New Hampshire, as I recall it, required that you have on your license plates on your cars a motto. Live Free or Die.

The Supreme Court, quite rightly said, you can't make someone state that. You can't require that person to participate in the dissemination of an ideological message by displaying it on his private property, his car, his house, whatever.

This is not the Wooley case that was a written ideological expression which the State required the plaintiff in that case to promulgate.

In this case plaintiffs are required to state nothing. I don't see how the fact that the plaintiffs are required to provide nondiscriminatory chiropractic x-ray referral or to honor on a nondiscriminatory basis chiropractic referrals in any way implicates their right of speech.

Second, the right to practice medicine. Well, I don't see how this is a fundamental right requiring a showing of compelling State interest. By that I mean, how the desire of radiologists not to honor chiropractic referrals is a fundamental right requiring the compelling State interest.

Now, the abortion cases are cited to me. But it is clear under them that if the physician's right to give medical care is co-extensive with the patient's right to receive that care, and the right to take it in the abortion cases is the right of the patient to have abortions as the U.S. Supreme Court defined them under the terms and times during which the U.S. Supreme Court said they could be obtained. The doctor's rights rise no higher than those necessary to give the patient legal rights that the Courts have said the patients have due them.

This regulation can be said to enhance a patient's right to care not to detract from it.

I need not, I think, dwell long on the freedom of contract claims. Our law has always said that most transactions involve contract. Laws also said that many instances of persons in the professional business may be forced to contract on a nondiscriminatory basis. I don't need to refer to the lunch counter cases and the hotel cases and the swimming pool cases to get my point across.

Now, the plaintiffs argue, and I think probably this is their best argument, that they are entitled to an evidentiary hearing on the grounds that this regulation has no rational basis. I think the regulation is extremely ill-advised.

Now, the Board did not spell out in terms of rationale for the regulation. However, that rationale is fully set forth in the Opinion of the Appellate Division I have referred to, particularly with respect to Dr. Albano's letter which is quoted, I believe, in full in the Appellate Division Opinion.

However, the Board need not set forth its rational basis, although I think it has in the Albano letter.

The fact that a promulgative body, a legislature or rule-making body does not set forth a rational basis doesn't mean that one does not exist or cannot be found.

I refer to *Delaware River Basin Commission* v. *Bucks County Water and Sewer Authority*, 641 F.2d 1087. Since I agree with the proposition that this regulation has to be tested only for constitutionality, only on a rational basis analysis, the Delaware River Basin case is appropriate.

In that case the Court was faced with the resolution adopted by a multi-State Commission implementing a provision of a bi-State compact.

The Court first determined that the rational relationship test applied. The Court then stated the proper approach was to identify the purposes of the statute to be sure that the purposes of the statute were legitimate.

Here the purpose of this statute clearly is to provide more information to the chiropractor in order to enable him to determine whether utilization of his methods of practice is appropriate and safe under the circumstances. That certainly is an appropriate legislative goal. Normally

one finds the basis, the reason for the enactment of a rule by the history of the rule or legislative history if its a statute. There was none in the Delaware River Basin case.

The Court held, however, that did not necessarily mean that the statute was invalid. The Court said, "So long as we are careful not to attribute to the Legislature purposes which it cannot reasonably be understood to have entertained, we find that in examining the challenged provision we may consider purposes advanced by Counsel for the Commission or suggested by ourselves."

It's clear to me that if we can pick out any suggested rational basis for this rule, there is a rational basis here.

We had pointed out in oral argument that in some circumstances physical conditions may exist that would render the utilization of chiropractic adjustment inadvisable and unsafe for a patient. I don't have exhaustive medical imagination, but in discussions with Counsel we had the example of a patient who has posterior broken ribs. If broken ribs, or even anterior broken ribs.

If broken ribs appear I would rather doubt that manipulating those broken ribs and letting them fly loose would be appropriate under the practice of chiropractic. They could puncture a lung and cause serious difficulty.

The same thing is true with a suggested herniated disc. If a person has a disc and the disc is herniated, again, I rather doubt that chiropractic adjustments may be appropriate or safe. I may be wrong in these examples but they will serve to illustrate the type of information that this regulation is trying to get to the chiropractor so the chiropractor can make his own judgment as to whether the practice of his branch of the healing art is safe and proper under the circumstances.

I have to say that the Legislature of New Jersey believes that the chiropractors are qualified to make a judgment as to whether their method of practice is appropriate and safe under particular circumstances. If that is not implicit in the licensing of chiropractors then I don't know what is.

It seems to me that this regulation has a legitimate and rational goal. The fact that I as an individual, or a legislator would not have voted for it, and I would have fought it, I think it's wrong and ill-advised, has nothing to do with the legal test I must apply to determine its validity. I don't think this thing infringes on anybody's rght of free speech. I think it has a rational basis, I think that's the appropriate test and I do not believe any constitutional rights of the plaintiffs are violated by imposing this regulation upon them.

I sum up again by saying that in terrorem arguments I reject. The chiropractor cannot, as he cannot, under the statute, use bodily invasive techniques for treatment of his own patients, then certainly it seems to me very clear he cannot require them.

The Board, by regulation, cannot expand the chiropractic ambit of treatment beyond that that is imposed by the statute.

Therefore, I think that as a legal matter this regulation clearly to me is limited to flat plates, it is not to the thought that chiropractors are going to subject patients to myelography and angiography and arteriography as a consequence of this regulation. Therefore, I'll adhere to my previous determination in this case and I will deny the Petition for Reconsideration.

Submit an Order, please.

APPENDIX C

Constitutional and Statutory Provisions Involved

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Stat. Ann. 45:9-2

It [the Board of Medical Examiners] shall make and adopt all necessary rules, regulations and by-laws not inconsistent with the laws of the State or of the United States, whereby to perform the duties and to transact the business required under the provisions of this article.

New Jersey A. C. Rule 13:35-6.18. Radiological Services

(a) "Physician" shall mean a physician possessing a plenary license to practice medicine and surgery and practitioners legally licensed to practice chiropractic.

(b) A physician possessing a plenary license to practice medicine and surgery who provides diagnostic radiological services for other physicians possessing a plenary license

to practice medicine and surgery shall, upon the request of a chiropractic physician, provide diagnostic radiological services to such chiropractic physician without discrimination on the basis of classification of license, provided the diagnostic radiological services requested pertain to skeletal areas of the body.

(c) Denial of professional diagnostic radiological services, as set forth herein, shall constitute purposeful and intentional discrimination and may subject the licensee to appropriate disciplinary action by the Board of Medical Examiners.

NO. 82-1673

Office-Supreme Court, U.S.
F I L E D
MAY 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARVIN BRODIE, M.D., *et al.*,

Petitioners,

v.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS

Counter-Statement of the Case

This case has come to this Court only after the petitioners have been rebuffed, twice in State court and twice in federal court, in their attack upon a rule of the New Jersey State Board of Medical Examiners, N.J.A.C. 13:35-

6.18, which requires physicians specializing in radiology to provide diagnostic radiological services to chiropractic physicians without discrimination on the basis of license classification.* Though the petitioners have mentioned in their petition for *certiorari* the adverse decisions of the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit, they have not mentioned that the Appellate Division of the Superior Court of New Jersey two years ago found the rule sustained by a legitimate regulatory purpose and that the Supreme Court of New Jersey subsequently refused further review. *Brodie* v. *N. J. Bd. of Medical Examiners*, 177 N. J. Super. 523 (App. Div. 1981), certif. den. 87 N. J. 386 (1981). For little wonder did both federal courts thereafter find the Board rule entirely appropriate under all pertinent constitutional standards. The petitioners' contentions are no less spurious now, and consequently this Court should deny their application for *certiorari*.

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* In pertinent part N.J.A.C. 13:35-6.18 provides:

> (b) A physician possessing a plenary license to practice medicine and surgery who provides diagnostic radiological services for other physicians possessing a plenary license to practice medicine and surgery shall, upon the request of a chiropractic physician, provide diagnostic radiological services to such chiropractic physician without discrimination on the basis of classification of license, provided the diagnostic radiological services rendered pertain to skeletal areas of a body.
>
> (c) Denial of professional diagnostic radiological services, as set forth herein, shall constitute purposeful and intentional discrimination and may subject the licensee to appropriate disciplinary action by the Board of Medical Examiners.

The Board determined to promulgate the rule after receiving 49 complaints from chiropractors and their patients stating that the patients had been denied examination by radiologists solely because they had been referred by chiropractors. As examples, the patient of one chiropractic physician who suspected atelectasis—incomplete lung expansion—was kept waiting while suffering a pneumothorax for over a half hour because the radiological group flatly refused to take x-rays, while another chiropractic patient in a great deal of pain referred for x-rays based upon a history of spinal fusion was similarly refused.

As other examples, in a number of cases Medicaid or Medicare patients were refused radiological services. In one case the chiropractor made a total of five unsuccessful attempts to have x-rays taken in different hospitals, and in another a Medicaid patient had to travel from Long Branch to Asbury Park to obtain x-rays after the local radiological group had refused to accept the chiropractor's referral. Often Medicaid payment for x-rays requested by a chiropractor could be had only through the circuitous route of obtaining an added referral by a plenary physician at public expense. This matter was therefore of considerable concern to the State Division of Medical Assistance and Health Services, which complained to the Board on three separate occasions.

Although the Board initially took the position in 1976 that it would not require radiologists to accept chiropractic referrals, the problem was of such dimension that the agency reconsidered the matter and, after an appearance before it by petitioner Marvin Brodie, proposed the rule on June 5, 1980. In response to the opportunity to submit comments contained in its notice the Board received 276 letters from patients and 14 letters from chiropractors favoring the rule. Only 11 letters and telegrams opposed

it, and only four contained anything more than conclusory statements of opposition. Those four letters, from the Radiological Society of New Jersey, the Medical Society of New Jersey, the American College of Radiology and the Morristown Radiology Associates, objected that the rule exceeded the legal authority of the Board and asserted that because chiropractic was based upon a different philosophy of treatment the chiropractic patient would somehow be better served by being altogether denied the expert services of the radiologist. No examples or even hypothetical situations in which this outcome would be apparent were furnished. Deciding, therefore, that the comments received did not warrant public hearing, the Board adopted the rule on August 5, 1980.

Later that month Marvin Brodie and others filed a notice of appeal with the Appellate Division of the Superior Court of New Jersey, seeking injunctive relief from that court. Upon being denied that relief they then filed a complaint with the United States District Court, but that court too denied a preliminary injunction while abstaining in order that issues of State law might be decided in the State appeal. On February 27, 1981 the Appellate Division unanimously affirmed the challenged rule. *Brodie* v. *N. J. Bd. of Medical Examiners, supra.* Holding that the Board possessed the statutory authority to adopt the regulation, 177 N. J. Super. at 530, the Appellate Division quoted at length a March 28, 1980 letter from Dr. Edwin H. Albano, President of the Board of Medical Examiners, to counsel for petitioner Brodie:

> [I]t is clear that a responsible chiropractor may need expert radiology services to determine whether chiropractic adjustment is appropriate and/or safe for a given patient and it is an exercise of responsible judgment for that chiropractor or for a podia-

> trist to request such expert radiological procedures before proceeding with independent patient management. Where [radiologists] have made their services available to all other competent physicians but have selectively discriminated against chiropractors and podiatrists as an entire class of limited licensees, such conduct is found by the Board not to be in the best interest of the people of this State.

So stating the rationale for the rule, the court found no merit in the petitioners' contentions that it interfered with their right to exercise an independent professional judgment or abridged any other rights. *Id.* at 526. On June 3, 1981 the Supreme Court of New Jersey denied the petitioners' petition for certification.

The State litigation thus having been concluded, the petitioners in August 1981 filed with the District Court notices of motion to reopen the federal proceedings and to take discovery from the Board members, seeking to have the Board members, for example, "[i]dentify each and every document referred to, examined, studied, read, discussed or which in any manner was connected with the Board's determination that the regulation should be adopted." With the Attorney General on behalf of the Board moving for summary judgment, the District Judge, Honorable H. Curtis Meanor, on February 22, 1982 detailed at length his reasons for affirming the validity of the rule. After noting that the regulation had been affirmed by the Appellate Division and that the Supreme Court of New Jersey had denied further review (PaB-2) and after pointing out as well that no First Amendment nor other fundamental right was implicated (PaB-5, 6), the judge recognized that the appropriate standard of constitutional review was to identify a rational basis for the rule and said:

> We had pointed out in oral argument that in some circumstances physical conditions may exist that would render the utilization of chiropractic adjustments inadvisable and unsafe for a patient. I don't have exhaustive medical imagination, but in discussions with Counsel we had the example of a patient who has posterior broken ribs . . .,
>
> If broken ribs appear, I would rather doubt that manipulating those broken ribs and letting them fly loose would be appropriate under the practice of chiropractic. They could puncture a lung and cause serious difficulty. [PaB-8]

Saying that the same conclusion would be drawn regarding a possible herniated disc, Judge Meanor indicated that such example would "serve to illustrate the type of information that this regulation is trying to get to the chiropractor so the chiropractor can make his own judgment as to whether the practice of his branch of the healing is safe and proper under the circumstances" (PaB-8). As he stated, "[I]t seems to me that this regulation has a legitimate and rational goal" (PaB-9).

In affirming this judgment the United States Court of Appeals pointed out that, under well-established principle, social and economic regulation does not offend the due process clause if the regulation is rationally related to a legitimate state purpose and that in this case "there is no dispute that the New Jersey Board of Medical Examiners had a legitimate purpose for promulgating the regulation in question"—that of "insur[ing] that chiropractors have access to information indicating whether a patient's physical condition makes chiropractic treatment unwise or even dangerous" (PaA-5). To survive the motion for summary judgment, the petitioners would have had to allege some set

of facts which, taken as true, would suggest the absence of a rational basis. The petitioners had not done so, for, even assuming that radiologists would not be able to practice in the manner in which they are accustomed, "[n]othing in [their] affidavits undercuts the presumption that the regulation will further the state's interest in providing better and safer medical care for the patients of chiropractors" (PaA-5, 6).

With respect to the First Amendment claim, the Court of Appeals observed that the petitioners had presented an affidavit indicating that at least one radiologist intended to communicate his disapproval of the chiropractic discipline by refusing to accept referrals from chiropractors (PaA-6, 7), but the court pointed out as well the proposition that a limitless variety of conduct cannot be labeled "speech" whenever the person engaging in the conduct intends to express an idea (PaA-7). Here the proposed conduct simply was not speech, for "there is nothing in the record that suggests any likelihood that the actions of the radiologists would be understood to communicate the intended disapproval" (PaA-8). In any event, a government regulation is justified if it is constitutionally authorized, if it promotes a substantial governmental interest, if that interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to furthering that interest (PaA-8). The court concluded:

> [W]e are convinced that [the petitioners] could advance no evidence sufficient to warrant the invalidation of the regulation. There is no question that the Board is empowered to promulgate the regulation and that the regulation furthers the important governmental interest in safe health care—an interest

> that is totally unrelated to the suppression of free expression. And, although we find it difficult to believe that this regulation will have any impact whatsoever on the right of radiologists to express their individual or collective opinion of chiropractic, any such impact will certainly be de minimis. [PaA-8]

Radiologists remained free, moreover, to recommend that patients consult with medical doctors, to express their views, orally or in writing, regarding any supposed evils of chiropractic and to lobby the Board, the State Legislature or the Governor to modify or repeal the rule (PaA-8, 9). In the words of the Court of Appeals, "[I]t would offend reason to hold that this regulation is prohibited by the first amendment" (PaA-9).

A pair of State courts and a pair of federal courts have thus determined that the petitioners' challenge to the Board of Medical Examiners regulation is unfounded. All of those courts concur that the rule is a legitimate exercise of State authority to protect the public welfare. Manifestly the case offers no justification whatever for review by this Court, and therefore the Attorney General on behalf of the Board opposes the petition for *certiorari*.

ARGUMENT

POINT I

As the Court of Appeals found, the Board of Medical Examiners rule forbidding radiologists from discriminating against referrals from chiropractors does not violate the Fourteenth Amendment in that it is supported by the rational basis of assuring the availability of expert radiological services to all patients needing it, and therefore *certiorari* should be denied.

The insubstantiality of the petitioners' contentions may best be judged by the notable lack of enthusiam with which they have been greeted by the four courts that have already heard them. Despite the petitioners' insistence upon attacking the Board of Medical Examiners rule in forum after forum in both the State and the federal domain, the regulation is, self-evidently, nothing more than an entirely conventional regulatory measure which is designed to prohibit discrimination by one class of health care providers against the patients of another and which is grounded upon the indisputable authority of the State, here delegated to an administrative agency, to protect the public health and welfare. Two years ago the New Jersey courts concluded both that the Board of Medical Examiners possessed the legislative power to promulgate the rule and that it had done so upon a plainly legitimate public purpose, infringing upon no constitutional prerogative, while the United States District Court and the United States Court of Appeals have now concluded, similarly, that a rational basis for the regulation exists and that no constitutional right has been violated. As in the other tribunals, the petitioners have presented to this Court not the slighest warrant for the granting of *certiorari*, and therefore their petition in that regard should be denied.

The standard which this Court has articulated for the evaluation of allegations that State legislation violates the Fourteenth Amendment is well-established and need be only briefly repeated. State regulations will not be invalidated as violating due process "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1954). Rather, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." From the equal protection standpoint, furthermore, "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). The question is not whether the provision will actually further a rational goal, but only whether a theoretical relationship exists between provision and purpose. *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U.S. 456, 463-464, 101 S. Ct. 715, 66 L.Ed. 2d 659 (1981).*

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* This Court has departed from this deferential attitude only with respect to the narrowest categories of classification. Strict scrutiny will be applied "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed. 2d 520 (1976), with fundamental rights including matters such as voting interstate travel and uniquely private activities, 427 U.S. at 312, n. 3, and suspect classes including only race, ancestry and alienage. *Id.,* n. 4. Only then is a court to demand a com-

(Footnote continued on following page)

These principles unquestionably apply to this Board of Medical Examiners rule. Far from constituting "misapplied broad dicta" (Pb10), they constitute the essence of due process/equal protection adjudication, affording the appropriate reconciliation of the relationship between individuals and their government, and they unerringly demonstrate the validity of this regulation. Both on its face and in light of the background material drawn up by the Appellate Division, the rule clearly has an underlying reasonable basis, for it is an anti-discrimination provision, requiring a radiologist to "provide diagnostic radiological services to [a] chiropractic physician without discrimination on the basis of classification of license," N.J.A.C. 13:35-6.18, and in no way distinguishable from the varous federal and State statutes forbidding discrimination on the basis of circumstances legislatively deemed irrelevant. *See e.g. Civil Rights Act of 1964,* 42 U.S.C.A. §1981 *et seq.; New Jersey Law Against Discrimination,* N.J.S.A. 10:5-1 *et seq.* The provision is, then, an entirely reasonable and appropriate regulatory measure designed to assure the availability of radiological services to all in need of them.

However much the language of the rule may speak for itself regarding its rational regulatory purpose, further illumination has been provided by the Appellate Division. That court quoted in its entirety a March 28, 1980 letter from Dr. Edwin H. Albano, President of the Board of

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(Footnote continued from preceding page)

pelling reason for a classification, and a "fair and substantial relationship" with a legitimate State end is demanded only regarding a gender-based classification. *Craig* v. *Boren;* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976). The pursuit of a medical practice does not involve a fundamental right. *Woods* v. *Holy Cross Hospital,* 591 F.2d 1164, 1173 n. 16 (5th Cir. 1979).

Medical Exminers, to counsel for Marvin Brodie, a plaintiff in the State litigation, *Brodie* v. *N. J. Board of Medical Examiners, supra,* 177 N. J. Super. at 527-528, and a petitioner in this Court. Observing that "a responsible chiropractor may need expert radiology services to determine whether chiropractic adjustment is appropriate and/or safe for a given patient" and that it is "an exercise of responsible judgment for that chiropractor . . . to request such expert radiological procedures before proceeding with independent patient management," Dr. Albano stated the Board finding that such selective discrimination is "not . . . in the best interest of the people of this State." *Id.* at 528. No more definitive statement of a rational purpose for a legislative provision can be imagined, and it is thus not surprising that both the District Court and the Court of Appeals thereafter swiftly concurred by rejecting the petitioners' claim.

Only brief response is needed concerning the petitioners' other contentions. They hypothesize that the Court of Appeals has somehow "confus[ed]" the standards pertaining to due process and equal protection challenges (Pb12), yet that court made no such error. As the Ninth Circuit has observed:

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. [*Beller* v. *Middendorf,* 632 F. 2d 788, 808 (9th Cir. 1980),

cert. den. sub nom. *Beller* v. *Lehman,* 452 U.S. 905, 101 S. Ct. 3030, 69 L.Ed. 2d 405 (1981)]

It is only when the government seriously intrudes into matters lying at the core of interests deserving due process protection that strict scrutiny will be utilized. *Ibid. See Williams* v. *Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed. 2d 586 (1970) (Harlan, J., concurring). Here, as noted, the "interest" which these petitioners assert is in no respect connected with any fundamental right and is therefore subject to any reasonable governmental control.

This most minimal of review standards most assuredly does not authorize the sort of plenary trial which the petitioners have always desired in this case. Such procedure would be blatantly contradictory of the rational basis test, given that proofs are to be allowed only when the existence of a rational purpose for the legislation is genuinely in doubt; when, as here, there is no doubt whatever in this regard, judgment validating the enactment must be granted without more. *Minnesota* v. *Clover Leaf Creamery Co., supra; United States* v. *Carolene Products Co.,* 304 U.S. 144, 153-154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). It would be contradictory as well of the proposition that an administrative agency head may not be subjected to intensive inquiry concerning the reasoning underlying a particular decision whose rationale is evident from its language and circumstantial context. *United States* v. *Morgan,* 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). Finally, it would ignore the fact that under the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.,* agency rulemaking of a non-emergent character may proceed only after all interested persons are afforded the reasonable opportunity for submitting comments, N.J.S.A. 52:14B-4(a), an opportunity which

was provided here. Consequently, however much the petitioners may wish to conduct an inquisition of the members of the Board of Medical Examiners, both before and during trial, the District Court and the Court of Appeals correctly concluded that their demand was wholly improper.*

The agency regulation at issue in this case is indistinguishable from the vast number of rules promulgated by a multitude of administrative agencies in every state across

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* The petitioners cannot escape this conclusion by seeking to erect a distinction between a legislative requirement adopted by the Legislature itself and a requirement adopted by one of the Legislature's designated administrative agencies. As this Court has said:

> It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. [*King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 103, 58 S.Ct. 489, 72 L.Ed. 801 (1928)].

For purposes of federal judicial review, the concept "statute" includes "every act legislative in character to which the State gives sanction, no distinction being made between acts of the State Legislature and other exertions of the state law-making power." *Hamilton* v. *University of California*, 293 U.S. 245, 258, 55 S.Ct. 197, 79 L.Ed. 343 (1934).

Again, however, the overriding point is that the Board of Medical Examiners rule is a self-evidently rational and legitimate provision designed to protect the public welfare. As four courts have already found, its very language, not to mention the background information provided by the letter of Board President Albano, demonstrates its purpose of making available radiological services to patients who previously had been denied access to them. No factual probing through discovery or trial could possibly undercut this rational basis.

the nation. All of them are designed, in one way or other, to promote the public good. All of them cause discomfort to some private interest. None of them is invalid on that account. Having had their due in both State and federal court, the petitioners have shown not the slightest justification for further consideration by this Court, and therefore their petition for *certiorari* should be denied.

POINT II

The Court of Appeals properly found both that "symbolic speech," and therefore the First Amendment, are not involved because the petitioners, upon receiving referrals from chiropractors, intended to do, literally, nothing, and that, in any event, the State and its agency are empowered to regulate activity which is conduct, and therefore *certiorari* should be denied.

If one were to entertain even the possibility of the petitioners having set forth a cognizable cause of action, the thought would be immediately dispelled by their singular proposal that non-compliance with the Board of Medical Examiners rule forbidding discrimination against chiropractic referrals constitutes "symbolic speech" which must be shielded by the full panoply of First Amendment protections.* Notwithstanding that the regulation is in all respects an entirely rational means of assuring the availability of radiological services and notwithstanding that a federal court is not to interfere with the operation of such

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* Although the petitioners have mentioned their First Amendment argument in this Court as well as in the Court of Appeals and the District Court, it may be pointed out that both their original complaint and their amended complaint are bereft of any such allegation.

a reasonably-based legislative measure, see Point I, *supra*, the petitioners argue in essence that any and all individuals subject to any sort of governmental regulation in the public interest may avoid the regulatory requirements through the verbal sleight of hand of sticking a First Amendment label upon their refusal to conform to the law. Any physician not comprehending the wisdom of Food & Drug Administration limitations on the use of unauthorized drugs may dispense the substances, or at least have a federal court scrutinize closely the focus of the federal agency rulemaking, because doing so constitutes his way of "symbolically" expressing his own perception of proper medical practice. Any owner of a public accommodation operating in interstate commerce may circumvent the statutory prohibition of racial discrimination because his exclusion of particular persons is his "symbolic" way of expressing dissatisfaction with prevailing social values. The proposition is absurd.

This Court has long recognized the obvious and necessary distinction between speech, which is protected by the First Amendment, and conduct, which is not. As this Court has said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed. 2d 672 (1968). Consequently, in every instance in which the contention is pressed the critical threshold question must be confronted —"whether [the litigant's] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Spence* v. *Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed 2d 842 (1974). As one federal court has observed, in order for conduct to be a surrogate of speech it must have characteristics which readily identify it as such:

> First, the conduct should be assertive in nature. This will generally mean that the conduct is a departure from the actor's normal activity and cannot adequately be explained unless a desire to communicate is presumed. Second, the actor must have reason to expect that his audience will recognize his conduct as communication. . . . [*United States ex rel. Radich* v. *Criminal Court of New York*, 385 F.Supp. 165, 173 n. 33 (S.D.N.Y. 1974)]

The *Radich* court quoted "Symbolic Conduct," 68 *Colum. L. Rev.* 1091, 1117 (1968), and other commentators have also pointed out the wholly conventional proposition involved. "Symbolic Speech and Compelled Expression: Wooley v. Maynard," 1977 *Utah L. Rev.* 797, 799 (1977); Nimmer, "The Meaning of Symbolic Speech Under the First Amendment," 21 *U.C.L.A. L. Rev.* 29, 36 (1973).

Plainly, the conduct in which these petitioners intend to engage is not speech, symbolic or otherwise. As the Court of Appeals found, "[T]here is nothing in the record that suggests any likelihood that the actions of the radiologists would be understood to communicate the intended disapproval" (PaA-8). They do not intend to affix a peace symbol to an American flag hanging outside an apartment window shortly after a military invasion, *Spence* v. *Washington, supra,* and they do not intend to wear black arm bands, an extraordinary mode of dress obviously designed to be protest. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969). Instead, they propose to do, literally, nothing, for they will simply not accept referrals from chiropractors supposedly to express their belief that the radiological and medical professions and the government should not condone or support chiropractic. They have no "reason to expect that [their] audience will recognize [their] con-

duct as communication." *United States ex rel. Radich* v. *Criminal Court of New York, supra.* Those not participating in this non-transaction, if noticing at all, will merely shrug; those turned away will be justifiably annoyed and angry. The public policy favoring freedom of expression will not be advanced even slightly.

The First Amendment is not to be used to erase all government power to regulate in the interest of the public health, safety and welfare. Even if "speech" be assumed to be somehow involved in a particular case, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978), quoting *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). It is one matter, certainly, if the governmental regulation is directed against speech as such, but it is quite another matter when the legislative measure is focused upon activities legitimately considered contrary to the public good. As this Court said in the *Giboney* case concerning an injunction against labor picketing, "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." 336 U.S. at 498.*

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* Although cited by the petitioners (Pb17), *NAACP* v. *Claiborne Hardware Co.,* —— U.S. ——, 103 S.Ct. 3409, 73 L.Ed. 2d 1215 (1982), hardly supports their contention. There this Court, while concluding that liability could not be imposed upon participants in a generally non-violent and politically motivated

(Footnote continued on following page)

Both the District Court and the Court of Appeals understood that whenever a litigant asserts a supposed right of free expression in defense to some governmental restraint upon his conduct, the reviewing court must consider the claim upon a number of criteria. It must first evaluate the contention upon the recognition that most human conduct does not constitute "symbolic speech," but is conduct pure and simple and may be controlled under the police power. The court must recognize further that, even assuming free expression to be somehow involved, the boundaries of the right to express oneself freely are delineated by the rights of others not to be intruded upon and, of particular importance to the present case, to enjoy the benefits afforded them by legitimate governmental regulation. *See generally,* Fuchs, "Further Steps Toward a General Theory of Freedom of Expression," 18 *Wm. & Mary L. Rev.* 347, 375-377 (1976).

The Board of Medical Examiners rule in question here plainly is an example of such legitimate governmental regulation. It deals solely with conduct—the petitioners' refusal to offer their services to patients who have sinned

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(Footnote continued from preceding page)

boycott, recognized nonetheless "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." 73 L.Ed. 2d at 1235. Unlike earlier cases in which the First Amendment had not protected concerted efforts to control the marketplace, the *Claiborne Hardware* petitioners had been seeking to vindicate rights secured by the Fourteenth Amendment, "not to destroy legitimate competition" in the face of government attempts to preserve it. The decision thus restricts not at all the legitimate power of government to enact a provision such as the Board of Medical Examiners rule, whose purpose obviously is not the suppression of speech, but the furtherance of the public health and welfare.

only by being referred by a chiropractor. The petitioners and all other radiologists remain free to expound at length to all who will listen concerning their dissatisfaction with the provision in particular and with chiropractic licensing in general. Indeed, they are at liberty to persuade as many as possible that the regulatory system should be dismantled. The issue is not that of requiring "alternative means of expression" (Pb17), for the petitioners' refusal to accept chiropractic referrals is not expressive at all and is, in any event, obviously open to government control. The issue is only whether the petitioners may impose upon the public through their conduct their own personal views rather than the quasi-legislative judgment of the Board of Medical Examiners and thereby deny the statutorily-guaranteed right to chiropractic treatment. With the Court of Appeals as well as the District Court having resolved that question against them, the petitioners have shown no justification for review by *certiorari*. Their petition in that regard should be denied.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Respectfully submitted,

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OCTOBER TERM, 1982

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Petitioners,

v.

BOARD OF MEDICAL EXAMINERS FOR THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Little of what the Board has submitted in opposition to the petition for a writ of certiorari relates to whether the issues are of sufficient importance to warrant this Court's attention. The Board's position apparently is that the decision below should not be reviewed because the court below correctly resolved the issues. This reply is necessary in order to clarify some salient issues which the Board has mischaracterized.

The crucial aspect of this case is the procedural posture of the litigation. The Board's long recitation of facts, Res. Br., at 3-5, 11-12, which were never presented before the district court, obscures the fact that review of the regulation

has thus far proceeded in a vacuum. The court of appeals has validated, without discovery or hearing, a regulation which has no regulatory history, no statement of purpose, and no findings, even though the challenging party is prepared to show that the regulation has no basis in reason and cannot further any legitimate state purpose. Thus, the Board's litany of facts is merely a distraction: such facts were not part of the record before the district court and have never been susceptible to discovery or rebuttal at any time in the history of litigation concerning this regulation.

Furthermore, the Board's emphasis on its success in state court proceedings is misleading and irrelevant. Res. Br., at 1, 2, 4-5, 8, and 9. The issues before the state courts concerned the validity of the regulation under state law. The federal constitutional claims were litigated in the federal courts. The Board's repetitious observation that petitioners lost in the courts below is quite unnecessary. After all, the petitioners are the party seeking review.

ARGUMENT

1. The Board misanalyzes the reasons for granting a writ of certiorari with respect to the due process issue. The question is not whether the rational relationship test is a liberal one. That point is not disputed. *See, e.g., Minnesota* v. *Cloverleaf Creamery*, 101 S.Ct. 715 (1981). The issue is whether the court of appeals has taken the liberal rational relationship test to such an extreme that the due process clause has been emptied of meaning. The petitioners are prepared to show that the regulation bears no relationship to the suggested state purpose, cannot improve the safety of chiropractic patients, and may increase the risk for such patients. As the Board tacitly recognizes, Res. Br., at 6, the only basis of record for the decision below is the district court's hypothesis, wholly unsupported by the record before it, that radiological services provided involuntarily to chiropractors will benefit chiropractic patients. Pet. Br. App., at B-8. The Board does not dispute that such a perfunctory resolution of an important constitutional right raises significant issues requiring review by this Court; the Board attempts to avoid the need for review by pointing to extra-record evidence to salvage the decision below. Res. Br., at 3-5, 11-12.

2. The characterization of the regulation as an "anti-discrimination" provision, Res. Br., at 11, is constitutionally irrelevant. The regulation compels radiologists to provide services to chiropractors and thereby infringes on the radiologists' due process right to practice their profession. The constitutional question is whether the regulation bears a rational relation to a legitimate state end, not whether the regulation is framed in a particular form. Examining the form of the regulation does not illuminate the rationality of the connection between regulatory means and ends.

See, e.g., Minnesota v. *Cloverleaf Creamery*, 101 S.Ct. 715 (1981); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

3. The Board's failure to recognize the proper approach to a due process claim starkly demonstrates the need for guidance from this Court. The Board repeats the error below in reciting the traditional rigid categorical test for equal protection claims and applying the test to this due process case. Res. Br., at 12-13.* The proper approach under the due process clause, however, is to determine whether the state interest is more significant than the burden on the individual right. The lower court's failure to apply this flexible approach to a due process claim results in a loss of conceptual clarity and a failure to recognize that the protection of individual liberty may be more complicated than the protection of the general right not to be classified according to certain characteristics. Thus, this Court should provide review in order to clarify fundamental constitutional issues regarding the due process clause.

4. The Board fails to isolate the true constitutional issue this case raises under the First Amendment. The court

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* The Board indicates that the analysis under the equal protection and due process clauses are analytically identical and quotes language from *Beller* v. *Middendorf*, 632 F.2d 788, 808 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 3030 (1981). The language from *Beller*, however, refers to analytical and rhetorical similarities in the approaches that the Ninth Circuit has discerned. *Beller* does not support the proposition that a due process challenge may be resolved by application of an equal protection test. The court recognized that unlike the categorical approach of equal protection analysis, "substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly involved, the importance of the government interests furthered, the degree of infringement and the sensitivity of the government entity responsible . . . to more carefully tailored alternative means of achieving its goals." *Id.* at 807.

below rejected the petitioners' claim under the First Amendment because it believed alternative means of communication exist. The court noted and the Board urges at length that conduct must be communicative in order to be protected. Res. Br., at 15-18. The only evidence of record, however, is that petitioners' conduct constituted symbolic speech, intended and understood to be communication. Pet. Br. App., at A-7 n.10. As a result, the court below concluded by resting its decision on the ground that alternative means of communication exist. The Board's extended discussion of whether conduct constitutes speech is not relevant to the fundamental constitutional issue raised by the lower court's decision.

5. The Board's infringement on petitioners' right to free expression cannot be justified on the Board's broad assertion that regulation of the public health is part of the police power of the state. The court of appeals committed a significant constitutional error in ruling that petitioners' expressive conduct is not protected by the First Amendment because alternative channels of communication exist. Pet. Br. App., at A-9. The Board cannot insulate that error from review by this Court with the incantation that the regulation is within the police power, because even so, the restriction must be no greater than is essential to further the governmental interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Thus, this Court should review this case to provide guidance and to resolve fundamental constitutional issues raised by the decision below.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

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